

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

**ISSUES**

- (1) What is the nature and extent of claimant's injury and disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds claimant has proven an entitlement to a twenty-five percent (25%) permanent partial work disability as a result of the injuries he suffered to his left shoulder.

Claimant began working for Boeing in February 1989. While working in deburr claimant suffered injury to his right hand and wrist. Respondent sent claimant to Dr. Robert Clark an authorized treating physician who, after a series of tests, performed an ulnar nerve compression removing three ganglion cysts at the same time. Claimant was returned to work under restriction by Dr. Clark in January 1991. The job claimant was placed at with Boeing violated these restrictions causing claimant to suffer additional injury. He was then referred back to Dr. Clark who again performed surgery on the right hand and wrist, releasing the thumb tendon using the same surgical incision he had with the earlier surgery. Claimant was returned to work in May 1991.

After being returned to work from this second surgery claimant was placed under significant restriction by Dr. Clark. He was prohibited from lifting over seventy-five (75) pounds maximum frequent lift, with carrying restricted to thirty-five (35) pounds. He was also restricted to working with the right wrist flexed at more than 30 degrees no more than two (2) minutes at a time with a five (5) minute break in between. He was prohibited from using vibratory tools and was allowed to use power tools for only a short period of time.

After returning to work claimant was placed in the work pool which included cleanup around the 47th Street Lake. On July 22, 1991, while using a twenty (20) foot aluminum pole with a net attached, cleaning debris out of the lake, claimant experienced a sudden onset of pain in his left shoulder. By the next day his shoulder was immobile.

He was referred by Boeing Central Medical to Dr. Lesko who prescribed cortisone injections into the shoulder and ordered MRIs and X-rays. The X-rays indicated a broken bone in the shoulder as well as cartilage damage. Dr. Lesko performed surgery on claimant's rotator cuff on August 7, 1991. While performing the surgery he also performed a chondroplasty of the humeral head which involved shaving off bone in order to eliminate any catching claimant might be experiencing. Claimant was assessed a thirteen percent (13%) functional impairment to the shoulder and given specific restrictions by Dr. Lesko prohibiting floor-to-waist lifts over seventy-five (75) pounds, no pushing and pulling in front of claimant of more than two (2) or three (3) feet and no overhead lifting in excess of twenty-five (25) to thirty (30) pounds. Claimant's thirteen percent (13%) functional impairment to the upper extremity converted to an eight percent (8%) whole body impairment.

In proceedings under the Workers Compensation Act the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving

the various conditions on which the claimant's right depends. Claimant must establish this burden by persuading the trier of facts by a preponderance of the credible evidence that his position on an issue is more probably true than not true on the basis of the whole record. See K.S.A. 44-501(a) and K.S.A. 44-508(g).

Claimant's burden must be established by a preponderance of the credible evidence, Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by the medical evidence presented in the case, but has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 870 P.2d 212, rev. den. 249 Kan. 778 (1991).

The Appeals Board finds that the presumption of no work disability found in K.S.A. 44-510e is not applicable in this situation. Claimant is entitled to a work disability.

Claimant was evaluated by two vocational specialists regarding the left shoulder injury. Karen Crist Terrill evaluated claimant on July 20, 1994 for the respondent. Ms. Terrill found claimant had restrictions to his right arm prior to suffering an injury to his left shoulder which, alone, would be disabling from the standpoint of a labor market analysis. In comparing Dr. Clark's restrictions to claimant's right wrist and arm Ms. Terrill found them to be more restrictive than Dr. Lesko's restrictions to claimant's left shoulder. As a result she found claimant's loss of access to the open labor market to be zero percent (0%) from the injury suffered to claimant's left shoulder.

Claimant was also examined by Mr. Jerry Hardin on behalf of the claimant. Mr. Hardin found claimant to have lost forty-five to fifty percent (45-50%) of his open labor market access based upon the restrictions of Dr. Lesko. When asked to compare the restrictions of Dr. Lesko to Dr. Clark, using Dr. Clark's restrictions as pre-injury and Dr. Lesko's restrictions as post-injury, Mr. Hardin found claimant suffered no additional labor market access loss as a result of the injury to his left shoulder.

The Appeals Board finds based upon the opinions of Ms. Terrill and Mr. Hardin that claimant has lost zero percent (0%) access to the open labor market as a result of the injury to his left shoulder.

Subsequent to suffering his left shoulder injury, claimant did continue working for a period of time with Boeing at a comparable wage but the Appeals Board finds this comparable wage was artificially created as the janitorial work claimant was performing for Boeing normally would only pay from \$4.25 an hour up to \$9.00 per hour. Jerry Hardin found claimant's loss of ability to earn comparable wages to be fifty percent (50%) based upon a current earning capacity of \$320.00 per week when compared to the average weekly wage of \$645.52 claimant was earning at the time of the injury.

In computing claimant's work disability the Appeals Board is obligated to compare both claimant's ability to perform work in the open labor market and claimant's ability to earn a comparable wage. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). The Appeals Board finds by giving equal weight to each factor that claimant is

entitled to a twenty-five percent (25%) permanent partial general work disability for the injury suffered on July 22, 1991 to his left shoulder.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey of January 3, 1995, is hereby modified and an Award is entered in favor of the claimant, Doil S. White, and against the respondent, The Boeing Company, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund for an accidental injury occurring on July 22, 1991, and based upon an average weekly wage of \$645.52 for 415 weeks for a 25% permanent partial general body work disability compensation at the rate of \$107.59 per week in the sum of \$44,649.85.

As of May 1, 1995, there would be due and owing to claimant 197 weeks permanent partial general body work disability at the rate of \$107.59 per week totaling \$21,195.23 which is ordered paid in one lump sum minus any amounts previously paid.

Thereafter the remaining 218 weeks are ordered to be paid at the rate of \$107.59 per week in the sum of \$23,454.62 until further paid or until further order of the Director.

The Appeals Board finds claimant is entitled to future medical benefits upon application to and approval by the Director.

The Appeals Board finds claimant is entitled up to \$350.00 unauthorized medical upon presentation of proof of said medical expense.

All compensation, medical expenses and costs are to be borne 50% by the respondent and its insurance carrier and 50% by the Kansas Workers Compensation Fund.

Claimant's contract for attorney fees is herein approved insofar as it is consistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed 50% to the respondent and its insurance carrier and 50% to the Kansas Workers Compensation Fund to be paid as follows:

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| William F. Morrissey<br>Special Administrative Law Judge | \$150.00 |
| Barber & Associates<br>Transcript of Regular Hearing     | \$ 79.60 |
| Kelley, York & Associates<br>Deposition of Doil S. White | \$218.20 |
| Deposition of Robert G. Clark, M.D.                      | \$157.71 |
| Deposition of Jerry D. Hardin                            | \$312.15 |
| Deposition of Paul Lesko, M.D.                           | \$167.25 |
| Don K. Smith & Associates                                |          |

Deposition of Kenneth D. Zimmerman, M.D.  
Deposition of Karen Crist Terrill

\$269.50  
Unknown

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Paul Hogan, Wichita, KS  
Eric K. Kuhn, Wichita, KS  
James R. Roth, Wichita, KS  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director